

Rule of Law in the Sudan

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The conclusion of the so-called Comprehensive Peace Agreement¹ in January 2005 and the adoption of a new constitution for the Sudan in July 2005 – which expressly incorporates the Comprehensive Peace Agreement² – marked the end of a 20-year civil war between the central government in Khartoum and various rebel movements in the southern parts of post-colonial Sudan, most notably the Sudan's People Liberation Movement/Army (SPLM/A).³ As a device to resolve Sudan's north-south conflict, the Interim National Constitution of the Republic of Sudan attempts to alter the prevailing system, superseding the 1998 Constitution of the Sudan.⁴ The very name of the instrument calls atten-

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- 1 Cf. Hatem Elliesie, 'Quo vadis bilād as-Sūdān? The Contemporary Framework for a National Interim Constitution', *Recht in Afrika (Law in Africa · Droit en Afrique)*, Volume 8, Issue 1, Köppe Verlag, Köln 2005, pp. 63 et seqq. (on pp. 65-68). See also Sara Basha, 'The Comprehensive Peace Agreement – A Synopsis', in Brian Raftopoulos / Karin Alexander (eds.), *Peace in Balance: The Crisis in Sudan*, Institute for Justice and Reconciliation, Cape Town, 2006, pp. 23 et seqq.; Mansour Khalid / Luka Biong Deng, 'The Sudan Comprehensive Agreement' in Peter Gwynvay Hopkins (ed.), *The Kenana Handbook of Sudan*, Kegan Paul, London / New York / Bahrain, 2007, pp. 811 et seqq.
- 2 Article 225 of the Interim National Constitution of the Republic of Sudan.
- 3 Philipp Dann / Zaid Al-Ali, 'The Internationalized Pouvoir Constituant – Constitution Making under external Influence in Iraq, Sudan and East Timor', *Max Planck Yearbook of United Nations Law*, Volume 10, Martinus Nijhoff Publishers, Leiden / et al., 2006, pp. 423 et seqq. (on p. 442); Hatem Elliesie, 'Friedensprozess und Verfassungsentwicklung im Sudan', *Verfassung und Recht in Übersee (Law and Politics in Africa, Asia and Latin America)*, Volume 8, Issue 3, Nomos Verlag, Baden-Baden / Hamburg, 2005 p. 276 et seqq.
- 4 Mohamed Fadlalla, 'The Regulation and Meaning of Concurrent Powers in the Interim National Constitution 2005 of Sudan', *Recht in Afrika (Law in Africa · Droit en Afrique)*, Volume 12, Issue 1, Rüdiger Köppe Verlag, Köln, 2009, pp. 131 (on p. 133); Noha Ibrahim, 'The Right to a Fair Trial in the Light of the Interim National Constitution: Theory and Practice', *Recht in Afrika (Law in Africa · Droit en Afrique)*, Volume 11, Issue 1 (Special Issue on the Administration of Justice in Africa: Effectiveness, Acceptance and Assistance), Rüdiger Köppe Verlag, Köln, 2008, p. 83; Fareed Omer Medani,

tion to its unusual status: It is “interim”, it is to be in effect for six years,⁵ until the referendum in Southern Sudan about secession.⁶ Recent experience, however, have demonstrated that holding elections with out adequate political and security preparation and disengaging too soon can undermine, rather than facilitate, the process of building the rule of law. Even though the Comprehensive Peace Agreement is silent on accountability and justice for past violations, it clearly constitutes a strong emphasis on the protection of human rights. Enshrining these rights in the Interim National Constitution and in statutory law is one of the key components of the rule of law. The combination of a lack of discernible political will, the weakness of the reform process and shortcomings in legal drafting have, however, resulted in little progress towards achieving those Comprehensive Peace Agreement’s objectives⁷ So far, this has been negatively impacted the enhanced recognition and protection of rights and the strengthening of the rule of law. Some fear that the rule of law alone won’t be able to achieve or maintain the promises made in the Comprehensive Peace Agreement and the Interim Constitution. Others argue that those two documents will be observed by both parties due to the presence of a sufficient military force to enforce them.

I. Rule of Law in Sudan’s constitutional (Con)text

The term “rule of law” / “supremacy of the rule of law”, i.e. “(siyādat) *hukum al-qānūn*”, can be found in Article 4 para. a, Article 25 para. e, Article 128 para. 2 and Article 144 para. 3 of the Interim National Constitution of the Republic of Sudan as a principle guiding the “devolution and distribution of powers between all levels of government”, the judiciary as well as the “Sudan National Armed Forces [“*al-musallaha al-qawmiyya as-Sūdāniyya*”] and the Joint/Integrated Units [“*al-wahdāt al-*

⁵ ‘The Salient Features of the Sudan Interim National Constitutional Constitution’, in Peter Gwynvay Hopkins (ed.), *The Kenana Handbook of Sudan*, Kegan Paul, London / New York / Bahrain, 2007, p. 803.

⁶ See Machakos Protocol, Part B (The Transition Process), 2.

⁷ Fred L. Morrision, ‘The World’s Most Complex Constitution: The Interim Constitutional Framework of the Sudan’, in August Reinisch / Ursula Kriebbaum (eds.), *The Law of International Relations – Liber Amicorum Hans Peter Neuhold*, Eleven International Publishing, Utrecht, 2007, pp. 229 et seq. (on p. 230); Hatem Elliesie, ‘Quo vadis bilād as-Sūdān? The Contemporary Framework for a National Interim Constitution’, *Recht in Afrika (Law in Africa / Droit en Afrique)*, Volume 8, Issue 1, Köppe Verlag, Köln 2005, pp. 63 et seqq. (on p. 66)

⁷ Redress Trust, *Promoting Law Reform in Sudan to enhance Human Rights Protection, Strengthen the Rule of Law and foster Democratic Process* (Written Evidence submitted by the Redress Trust to the UK Associate Parliamentary Group on Sudan: Parliamentary Hearings: Sudan’s Comprehensive Peace Agreement), The Redress Trust, London, 15 October 2009, pp. 3-6 and p. 9.

mushtaraka/al-mudmaja"].” Being part of the normative chapter of the Interim National Constitution, the rule of law principle derives, in contrast to declarations in constitutional preambles, from the legally binding constitutional basis. Not only, although most notably, the executive and judiciary are addressed to fulfil their rule-of-law obligations but also the aforementioned armed forces.

II. Constitutional Separation of Powers

It is quite interesting that the executive, the judiciary and the armed forces state explicitly the compliance with the rule of law: The executive branch has been the predominant authority in the Sudan. Executive control e.g. over the judiciary and the conduct of the courts has seriously compromised the rule of law in the Sudan. This may be remnant of colonial rule, in which governors-general held nearly plenary power; it may be result of a frequency of presidential governances with military background.⁸ The executive control is exercised within the framework of emergency regulations imposed mainly by ‘Umar Hasan Ahmad al-Bashīr’s military regime. The executive authority is so substantial that the President may even issue decrees (“*marsūm*” / pl. *marāsīm*) with the force of law when the legislature is not in session, submitting them to the legislative bodies for subsequent ratification.⁹ However, the Interim National Constitution does place, according to Article 109 para. 2, certain limits on this power, namely in cases where “matters affecting the Comprehensive Peace Agreement, the Bill of Rights, the decentralized system of government, general elections, annual allocation of resources and financial revenues, penal legislations, international conventions or agreements altering the borders of the State”.

In the hierarchy of Sudanese laws, constitutional law prevails over any act of the legislature: This applies to bills of the national legislature¹⁰ but is likewise valid for legal acts of the executive where it is vested with delegated powers to enact regulations¹¹. In view of the *trias politica*, the Interim National Constitution formally governs the executive authority and the judiciary: It prevails over any act of the executive,

8 Fred L. Morrison, ‘The World’s Most Complex Constitution: The Interim Constitutional Framework of the Sudan’, in August Reinisch / Ursula Kriebaum (eds.), *The Law of International Relations – Liber Amicorum Hans Peter Neuhold*, Eleven International Publishing, Utrecht, 2007, pp. 229 et seq. (on p. 234).

9 See Article 109 para. 1 of the Interim National Constitution of the Republic of Sudan.

10 See Article 83 of the Interim National Constitution of the Republic of Sudan.

11 See Article 115 of the Interim National Constitution of the Republic of Sudan.

and it also ranks above the Interim Constitution of Southern Sudan and the states constitutions (*dasātīr al-wilāyāt*). In order to harmonize laws with international standards as provided for in the Interim National Constitution, the *lajna al-murāja'a al-qānūnīa* (Law Review Committee), established by the Sudanese Government within the National Ministry of Justice, brings domestic legislation in line with the provisions of the Interim National Constitution.¹² These laws include, *inter alia*, the *qānūn al-ijrā'āt al-jinā'īa* (Criminal Procedure Act of 1991); the *qānūn al-quwwāt al-musallaha* (People's Armed Forces Act of 1986); the *qānūn quwwāt ash-shurta as-sūdānīa* (Police Forces Act of 1999); and the *qānūn al-qadā'* (Judiciary Act of 1986).¹³ In doing so, it remains to be seen whether the Ministry of Justice addresses the issue of the crucial and controversial status of the office of the Chief Public Prosecutor (*an-nā'ib al-'āmm*), which was set up according to Article 197 of the National Constitution of 1973. By virtue of his office, the *an-nā'ib al-'āmm* should be an independent organ of the judiciary. Due to the constitutional separation of powers, the office should neither be constrained by directives of the executive branch of the state, nor should it be mixed with their authority. In Sudan, however, this is not the case: The *an-nā'ib al-'āmm* is, by virtue of his office, Minister of Justice.¹⁴

III. Judicial Review

In this regard, one should recall that the strict implementation of the rule of law requires the existence of an independent judiciary in order to protect the individual and public rights and freedoms in any society from the encroachment of the executive. According to Article 181 para. 3 of the Interim National Constitution of the Sudan state legislation shall provide for guarantees for the independence and impartiality of the state judiciary of the judiciary and ensure that judges are not subject to any interference. It is therefore enacted in the *qānūn al-qadā'* (Judiciary

12 Hatem Elliesie / et al., 'Different Approaches to Genocide-Trials under National Jurisdiction on the African Continent - The Rwandan, Sudanese and Ethiopian Cases', *Recht in Afrika (Law in Africa · Droit en Afrique)*, Volume 12, Issue 1, Köppe Verlag, Köln 2009, pp. 21 et seqq. (on p. 64).

13 Opening Remarks delivered by the Sudanese Minister of Justice at a Law Reform Workshop on September 2006 in Khartoum organized by the United Nations Mission in Sudan.

14 Jamāl ad-Dīn 'Alī at-Tūm, *tashrī' as-sūdānī fī mīzān huqūq al-insān* (silsila dirāsāt huqūq al-insān, no. 12), Markaz al-Qāhira li-Dirāsāt Huqūq al-'Insān, Cairo 2006, p. 37.

Act of 1986) that the judiciary is an independent power.¹⁵ The independence of the judiciary and the doctrine of judicial review are important components of the checks and balances against potential abuses of power by the executive and legislative branches of government. Yet, until 1974, there was no statute authorising the judges to review the decisions of the executive authority in the Sudan. But the courts were able to exercise this power through the principle of *certiorari*, *mandamus*, and injunction declaration which were derived from English Common Law in accordance with the provisions of the then section of the Civil Justice Ordinance of 1929. In 1974, however, the power of judicial review was provided under Section 312 of the *qānūn al-ijrā'āt al-madaniyy* (Civil Procedure Act), and, since 1983 in the new Civil Procedure Act. In 1996, the provisions conferring the power of judicial review entered into a new act, the so-called Constitutional and Administrative Act.¹⁶

IV. Challenging Law Reform

The war situation in the Sudan has, however, promoted the exercise of unchecked power, of the executive authority by security services and in the political manipulation of the court system. Since 2005, all national laws and legal acts must, on the other hand, comply with the Interim National Constitution of the Sudan. To cope with this prospect, the process of law reform is quite challenging: Not only does Sudanese law lack a provision allowing for prosecution on the basis of command responsibility, Sudan has enacted many immunity provisions that impede the prosecution of those in the military, police, and security agencies who are responsible for crimes particular with regard to Darfur¹⁷. Im-

15 Cf. Section 61/62 of The Sudan's 13th Constitutional Decree of 1995 and Section 8 of the *qānūn al-qaḍā'* (Judiciary Act of 1986).

16 Islamil Attia Musa / Farida Ibrahim Hussein / John Wuol Makec, 'The Role of the Judiciary in the Protection of Human Rights in the Sudan', in Eugene Cotran / Adel Omar Sherif, *The Role of the Judiciary in the Protection of Human Rights*, CIMEL Book Series No. 5, Kluwer Law International, London / The Hague / Boston, 1997, pp. 126 et seqq. (on p. 128).

17 Cf. Hatem Elliesie, '(International) Human Rights Law and Humanitarian Law: The Case of Darfur', in Hatem Elliesie (ed.), *Beiträge zum Islamischen Recht VII: Islam und Menschenrechte / Islam and Human Rights / al-'Islām wa-Huqūq al-'Insān*, Peter Lang Publishing Group, Berlin / Frankfurt am Main / New York / Oxford / et al., 2010 [in print]. See also Hatem Elliesie, 'Die Darfur-Krise im Sudan und das Völkerrecht: Eine Herausforderung für die Vereinten Nationen (UN) und den Internationalen Strafgerichtshofes (ICC)', *Verfassung und Recht in Übersee 40 (Law and Politics in Africa, Asia and Latin America)*, Volume 40, Issue 2, Nomos Verlag, Baden-Baden / Hamburg, 2007, pp. 199-229.

munity for members of national security forces was enshrined in the *qānūn al-amn al-wataniyy* (National Security Forces Act of 1999). Article 33 of that act states, that “no civil or criminal proceedings shall be instituted against a member, or collaborator, for any act connected with the official work of the member, save upon approval of the Director [...]”. Similar language can be found in other acts and decrees regulating government actors as well. Article 46 of the *qānūn quwwāt ash-shurta as-sūdāniyya* (Police Forces Act of 1999) stipulates that “no criminal procedure will be taken against any police officer for a crime committed while executing his official duty or as a consequence of those official duties without permission of the Minister of the Interior”. Furthermore, Criminal Decree No. 3/95 sets forth requirements for bringing charges against members of the armed forces in criminal courts and specifies that criminal courts have no authority to pursue charges without approval by the armed forces or a decree from the Chief Justice. In addition, a temporary decree issued by the President on 4 August 2005, attempted to extend immunity of the armed forces by amending the *qānūn al-quwwāt al-musallaha* (People’s Armed Forces Act) stating that “there shall not be taken any procedure against any officer, ranker [sic!] or soldier who committed an act that may constitute a crime done during or for the reason of the execution of his duties or any lawful order made to him in this capacity and he shall not be tried except by the permission of the General Commander or whoever authorized by him.” This decree extended protection for the armed forces by including the PDF-militia and *Jannjāwīd* in protection from prosecution without government consent.¹⁸

V. Conclusion

Summing up, it is critical that four years after signing of the Comprehensive Peace Agreement one of its key objectives has not been advanced. This failure is indicative not simply of problems of capacity and coordination but raises more fundamental questions: Is it still possible that the elements of the Comprehensive Peace Agreement pertaining *inter alia* human rights and especially the rule of law can be achieved during its envisaged life span? Is there a tacit readiness, not only on the part of Sudan’s Government of National Unity but also international ac-

18 Hatem Elliesie / et al., ‘Different Approaches to Genocide-Trials under National Jurisdiction on the African Continent - The Rwandan, Sudanese and Ethiopian Cases’, *Recht in Afrika (Law in Africa · Droit en Afrique)*, Volume 12, Issue 1, Köppe Verlag, Köln 2009, pp. 21 et seqq. (on p. 59).

tors, to sacrifice these components if seen necessary for the completion of certain CPA milestones, namely elections in 2010 and the referendum in South Sudan in 2011? National as well as international actors working on the area of law reform have succeeded only partially in highlighting the importance of, and contributing to, a successful reform process. The political dimension of law reforms in the presented context has recently been highlighted by the announcement of the All Political Party Conference that they will boycott elections if substantive changes to key legislations are not made beforehand.¹⁹ Hence, establishing rule of law in the Sudan will require a combination of community-based approaches and capacity building of rule-of-law institutions. They must be reinforced by good governance and serious political action at the national and international level. A stronger diplomatic interest at the national, regional and international level may spur the parties to the Comprehensive Peace Agreement to take legislative reforms more seriously and may result in a strengthened role of civil society in any initiatives in this context.²⁰ The absence of effective action at community, state, national and international level could undermine the entire North-South peace-building process, suffering a setback of the rule-of-law progress made so far.

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19 Cf. Juba Declaration on Dialogue and National Consensus, Chapter 4 (Democratic Transformation), para. ii et seq. See also Report of the Secretary-General on Elections in the Sudan, New York, 28 July 2009, UN-Doc. S/2009/391, para. 31-34.

20 Sebastien Gouraud, 'Rule of Law in Sudan's three Areas', *Forced Migration*, Issue 26, Refugee Studies Center, Oxford, August 2006, p. 58; Redress Trust, *Promoting Law Reform in Sudan to enhance Human Rights Protection, Strengthen the Rule of Law and foster Democratic Process* (Written Evidence submitted by the Redress Trust to the UK Associate Parliamentary Group on Sudan: Parliamentary Hearings: Sudan's Comprehensive Peace Agreement), The Redress Trust, London, 15 October 2009, p. 6.

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